LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 6 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 875

THE HEYWARD-ROBINSON COMPANY, INC., and MARYLAND CASUALTY COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, for the use and benefit of D'AGOSTINO EXCAVATORS, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRWIN M. ECHTMAN
Attorney for Respondent
6 East 39th Street
New York, N. Y. 10016

TABLE OF CONTENTS

	PAGE
THE TRIAL	1
ARGUMENT—The result below would not be affected by a change in the requirement that a permissive counterclaim requires support of independent jurisdictional grounds	2
The Decision of the Court of Appeals is Wholly Consistent With Decisions of This Court	4
CONCLUSION	6

Cases Cited

Lesnick v. Public Industrials Corporation, 144 F. 2d 968 (2 Cir. 1944)	5
Moore v. New York Cotton Exchange, 270 U.S. 593 (1926)	2, 4-6
Southern Construction Co. v. Pickard, 371 U.S. 57 (1962)	5, 6
United Artists Corp. v. Masterpiece Productions, Inc., 221 F. 2d 213 (2 Cir. 1955)	5
United States, To Use and For Benefit of Foster Wheeler Corporation v. American Surety Co. of New York, 142 F. 2d 726 (2 Cir. 1944)	5
United States ex. rel. Pickard v. Southern Construction Company, 293 F. 2d 493 (6 Cir. 1961)	5, 6

Statutes Cited

Miller Act, 44 U.S.C. §270(b)	5

PAGE

Rule Cited

FRCP:

13 2

13(a) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 875

THE HEYWARD-ROBINSON COMPANY, INC., and MARYLAND CASUALTY COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, for the use and benefit of D'AGOSTINO EXCAVATORS, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Trial

Contrary to Petitioners' contention, the record indicates both jobs were performed concurrently in the State of Connecticut, one in Stamford and the other at New London.

Most progress payments to respondent were not allocated as between jobs and were made on a lump sum basis as though for a single account. Petitioners' officers were not able, on examination, to identify the jobs to which particular checks applied. Attempts by petitioners to allocate two payments totalling $6,000.00 were withdrawn when it was established that the payments did not relate to either job and the purported allocations were fraudulent.

ARGUMENT

The result below would not be affected by a change in the requirement that a permissive counterclaim requires support of independent jurisdictional grounds.

Under FRCP 13 and the doctrine of *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 609 (1926) independent jurisdictional grounds are not required for a compulsory counterclaim, but are required for a permissive counterclaim.

The majority of the Court of Appeals, in finding a compulsory counterclaim here stated:

> "There was such a close and logical relationship between the claims on the Navy and Stelma jobs that the Stelma counterclaims arose out of the same 'transaction or occurrence' as those terms are now broadly defined. Both subcontracts were entered into by the same parties for the same type of work and carried on during substantially the same period. Heyward had the right to terminate both subcontracts in the event of a breach by D'Agostino of either. Heyward also had the right to withhold monies due on one to apply against any damages suffered on the other. Progress payments

made by Heyward were not allocated as between jobs and were made on a lump sum basis for both as though for a single account.

"A single insurance policy covered both jobs. The letters of Heyward to D'Agostino of October 8 and 19, 1965, threatening termination and terminating both jobs, allegedly because of the cancellation by D'Agostino of this joint insurance coverage and failure to properly man both projects, treated both jobs together. These letters formed the basis of one of Heyward's major claims at the trial.

"The controversy between the parties which gave rise to this litigation was with respect to both jobs and arose from occurrences affecting both. Indeed, it would seem to have been impossible for Heyward to have fully litigated the claims against it on the Navy job without including the Stelma job, because the payments it made to D'Agostino could not be allocated between the two jobs.

"As the appellants themselves point out in their brief, the 'Stelma and Navy claims were so interwoven at the trial that they are now absolutely incapable of separation.' The proof as to payments and alleged defaults in payments was made without any differentiation between the two claims and neither of the parties were able to offer any evidence of apportionment. Finally, the evidence as to the breaches of contract claimed by the respective parties related in the main to both contracts rather than to one or the other."

In Judge Friendly's opinion, however, the counterclaim interposed by petitioner was permissive only. He nevertheless voted to affirm the District Court judgment because

of a desire on his part to change the "conventional learning" (Pet. Brief, p. 33) that a permissive counterclaim needs independent jurisdictional grounds to support it. Judge Friendly would have permissive as well as compulsory counterclaims disposed of in a single litigation.

There was jurisdiction under the majority's view, because the counterclaim was compulsory. There was also jurisdiction under the minority's view of permissive counterclaims. Thus the result of the case is the same under both views. Moreover, Judge Friendly's suggestion that the Court of Appeals sit *en banc* to reverse the "conventional learning" was not accepted by his brethren, indicating that the conventional view still prevails. It is therefore respectfully submitted that the question does not merit the attention of this Court.

Petitioners, who now contest jurisdiction of the counterclaim, urged it in the District Court. A month long trial ended in a jury verdict for respondent. Then, for the first time, petitioner, in the Court of Appeals, argued lack of jurisdiction. Certainly, on a belated claim of that nature, the Court of Appeals was correct in viewing the jurisdictional question "in light of the record as a whole". Moreover, it would be impossible to try the Stelma and Navy claims separately, if for no other reason, because of the complete inability of either party to allocate payments as between jobs.

The Decision of the Court of Appeals is Wholly Consistent With Decisions of This Court

The decision of the Court of Appeals is consistent with the decision of this Court in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926). This Court there held "transaction" as used in FRCP 13(a) to be be a "word

of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of the connection as upon their logical relationship." (270 U.S. at 610). In holding the counterclaim to be compulsory, the Court of Appeals followed that definition. The Court of Appeals has in fact consistently adhered to the definition of "transaction" as expounded in *Moore, supra.* See, for example, *Lesnik* v. *Public Industrials Corporation,* 144 F.2d 968 (1944), *United Artists Corp.* v. *Masterpiece Productions, Inc.,* 221 F.2d 213 (1955) and *United States, To Use and For Benefit of Foster Wheeler Corporation* v. *American Surety Co. of New York,* 142 F.2d 726 (1944).

The facts stated in Judge Bryan's opinion clearly set forth the existence of a "logical relationship" between the two claims.

Nor is there any conflict between the decision below and *Southern Construction Co.* v. *Pickard,* 371 U.S. 57 (1962) where the Court of Appeals (6 Cir.) held that failure to allocate payments between two contracts between the same parties creates a "logical relationship" between them which makes a counterclaim relating to one compulsory in an action on the second (293 F.2d 493). In reversing on other grounds, this Court did not disturb the finding by the Court of Appeals of a logical relationship between the two contracts, which made the counterclaim compulsory. Rather, this Court found that due to the peculiarities of the case, one contract relating to Tennessee work, and the other to Georgia work, the *Miller Act* prevented assertion of the counterclaim in the first suit. Since both were *Miller Act* claims, and the *Miller Act* requires suit to be brought "in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ." (44 U.S.C. §270(b)), one suit had to be brought in Ten-

nessee and the other in Georgia. The general contractor "was required by statute to split those claims and to bring two separate actions in two different districts. The fragmentation of these claims, therefore, (sic) was compelled by Federal Law . . ." (371 U.S. 57, 60).

In the case at bar, statute does not require that the claims be split and brought in different jurisdictions. The test of a "logical relationship" as enunciated by this Court in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 and followed by the Court of Appeals for the Second Circuit in the cases cited above, and by the Court of Appeals for the Sixth Circuit in *Pickard, supra*, has been met.

Research has not disclosed, and petitioners do not assert, a conflict between circuits in the application of the doctrines of *Moore* v. *New York Cotton Exchange, supra.* Accordingly, there is no compelling reason for granting of certiorari herein. The conclusion of the majority, concurred in by Judge Friendly, was that "substantial justice was done here."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

IRWIN M. ECHTMAN
Counsel for Respondent.